SUPREME COURT OF THE UNITED STATES.

No. 275.

AMOS AND JOHN E. KENDALL, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM COURT OF CLAIMS.

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1 In the United States Court of Claims.

Petition.

To the Court of Claims:

The petition of Amos Kendall and John E. Kendall, of the District of Columbia, respectfully represents:

That being referred by the Senate of the United States to your court for adjudication of a claim against the government, we proceed to submit a full statement of said claim.

In the spring or summer of 1843 we were applied to by the Western Cherokees, being that portion of the Cherokee tribe of Indians which emigrated to the country west of the Mississippi river prior to the year 1835, to aid them as agents and counsel in prosecuting an important claim against the United States. They had no means of compensating their counsel other than a lien on a portion of the claim itself; and, having satisfied ourselves that the claim was a good one, we consented to aid in its prosecution for a commission of five per cent. upon any moneys or whatever else of value might be recovered, secured by a power of attorney, coupled with a contract for service to be rendered, authorizing us to receive our compensation directly from the United States. Accordingly, a contract was entered into by us, containing a power of attorney as aforesaid, bearing date the 12th July, 1843.

Having, as we supposed, under the laws of the land and the practice of the government, secured compensation for our services, we entered zealously upon the performance of our contract. Vast masses of public documents were overhauled, a voluminous memorial to Congress was prepared, arguments requiring great research and labor were presented to three successive Secretaries of War and to the Commissioner of Indian Affairs; discussions in the public press were carried on, and, after years of persevering effort, the government became satisfied of the injustice which had been done to those unhappy people. Commissioners were appointed to investigate the matter and endeavor to make such an adjustment among the parties into which the Cherokees were divided as might be just to each and induce them to become one consolidated and harmonious tribe.

One of your petitioners appeared before the commissioners as counsel for the Western Cherokees, and by an argument prepared with great research and labor, vindicated their claim. And thereafter, until an appropriation was made by Congress to satisfy said claim, your petitioners omitted no proper occasion to press it upon the various branches of the government.

In every stage of these proceedings, from 1843 to 1851, your petitioners were recognized and treated with by the government
2 as the authorized agents and counsel of the Western Cherokees—by three successive Secretaries of War, by one Secretary of the Interior, by four successive Commissioners of Indian Affairs, and by the commissioners who negotiated the Cherokee treaty of 1846; and the facts that the service required by our contract had been faithfully performed, and that we were justly entitled to the

stipulated compensation, were, on sundry occasions, admitted by the public authorities.

Your petitioners further state that the treaty, as it came from the hands of the commissioners, contained a provision setting apart fifty thousand dollars to pay the debts and counsel fees of the Western Cherokees; a limitation opposed by them, because the sum was insufficient to meet their contracts with counsel and pay their debts which had been incurred by them in Washington and elsewhere during the many years they had been prosecuting their claim. The Senate, however, in ratifying the treaty, for reasons unknown to your petitioners, struck out this provision, leaving no fund out of which even the board bills of the Western Cherokee delegation could be paid, inasmuch as another provision of the treaty required that the entire amount appropriated to satisfy the claim should be distributed *per capita* among the individual Western Cherokees.

The Westetn Cherokee delegation at first refused to ratify the amended treaty, because it would, in their estimation, be an act of bad faith towards their creditors and counsel; but they were finally induced to acquiesce in it by the hopeless condition of their affairs, and a loan to them of twenty thousand dollars out of the funds provided for the two other Indian parties to the treaty, which the government at once advanced out of the public treasury. But, in order to do what they could to maintain good faith with their counsel, the Western Cherokee delegation paid the stipulated commission on the moneys advanced them, and indorsed on our contract an authority and request to the Secretary of War "to pay the commissions stipulated for in the within contract out of any moneys which may be appropriated to pay the debts of the Old Settlers, or out of any moneys which may be found due to them under said treaty, it being our intention (said they) that this contract shall be executed in good faith."

In February, 1847, we presented the case to Congress in a memorial, stating the facts, and prayed that body, in making an appropriation for the Western Cherokees, to provide for the payment of our commissions. This memorial concluded with the declaration that "if the United States shall, by their interposition, prevent and refuse payment of this contract debt out of the moneys belonging to the Western Cherokees now under their control, they will, by such acts and refusal, become, in the opinion of your memorialists, morally, if not legally, bound to pay the debt out of their own treasury."

In a communication dated June 8, 1848, to the Secretary of War, signed by Colonel Stambaugh and your petitioner, Amos Kendall, our case was fully stated, a copy of our contract was transmitted, and we prayed for such action as would secure to us our stipulated compensation.

On the 27th of the same month we again memorialized Congress, and sent with our memorial a copy of our contract. In that paper we held the following language, viz:

3 "History records many instances in which this government have interposed to compel foreign and *quasi* foreign nations and tribes to pay their just debts to American citizens; but this is

probably the first instance in which a government has interposed to prevent such a payment. The records of the War Department are full of instances in which the government have shown a paternal solicitude to secure the payment of debts due from individual Indians to American citizens, but this is a debt of much higher character. It is the debt of a whole tribe, band, or party, of that aggregate of people forming one of the three Indian parties to the treaty of 1846.

"Your memorialists have been told that they may collect their debt of the individuals of that party. They have no contract with individual Cherokees. The United States did not think it necessary to ask the assent of the individuals of that party to the treaty of 1846; and to turn your memorialists to that as a last resort would be mockery added to injustice.

"Seeing that the United States have themselves created the only obstacle to the payment of this just debt, your memorialists look to them for its removal. And if, instead of removing it, they shall dissipate the moneys in their hands in trust for the Western Cherokees, regardless of the contract rights now as well as heretofore made known, your memorialists will have a right to consider the United States their debtor, and never cease to ask for payment until it shall be obtained. No claim for French or Mexican spoliations can be half so strong; for in this case the government itself will have been the wrong-doer, being itself the author of the provisions in the treaty under cover of which the wrong will have been done, and having itself, after notice, dissipated the funds upon which the debt is justly chargeable.

"Where else can your memorialists look for justice, inasmuch as the tribe or body of men with whom they contracted, is alleged by the United States to have been annihilated by the treaty, and all its property will have been distributed among its members?

"Your memorialists, therefore, most respectfully pray that provision be made for the payment of the commission justly due to them out of the moneys which have been or may be appropriated for the benefit of the Western Cherokees under the treaty of 1846, in pursuance of the terms of their contract."

As early as June, 1848, therefore, both the Executive and Congress had full notice of this claim, and were in possession of copies of the contract embracing the irrevocable power of attorney on which it was based.

On the 18th of January, 1849, the Senate adopted a resolution calling on the Secretary of War for information in relation to the claims against the Cherokees, and particularly the Old Settlers or Western Cherokees. On the 9th February, 1849, the Secretary responded to this call, transmitting among other things, a copy of our contract, and the authority on which it was based, together with several recognitions of the contract after the treaty was ratified, voluminous arguments in favor of the claims of the Western Cherokees, and a letter of Colonel Stambaugh and your petioner,
4 Amos Kendall, asking for some provision to secure the payment of our commissions according to contract. This report consti-

tutes Senate Executive Document No 28, second session 30th Congress.

In this document, page 4, the Commissioner of Indian Affairs, Hon. W. Medill, says, "the files of the department attest the assiduity and ability with which Messrs. Stambaugh and Kendall attended to the duty intrusted to them; and I think it highly probable that the Western Cherokees, or 'Old Settlers,' are greatly indebted for the stipulations made for their benefit in the treaty of 1846, to the researches and persevering efforts of their counsel. The evidence on which I have based my opinion is my own knowledge of the personal exertions of the counsel named, and that shown in the accompanying papers." He then refers to the papers, which in fact do not embrace a third part of those prepared by us in this case, as we are prepared to show.

This document brought the whole subject before Congress in the most formal manner; but nothing was done for our relief.

At the next meeting of Congress, the new Commissioner of Indian Affairs, Orlando Brown, esquire, in his annual report, called the attention of Congress to the subject, in the following words, viz:

"A considerable amount will be due to that portion of the Cherokees known as the Old (or original) Settlers, west of the Mississippi, who, as a separate and distinct community have incurred liabilities of various kinds; and among others, for valuable and efficient services rendered them in prosecuting their claim against the government, and which, it is well known, were greatly instrumental in effecting the recognition of those claims, and the large allowances in consideration of them. In the treaty as negotiated a provision was inserted, setting apart a portion of the sum to be awarded them, to enable them to meet such liabilities; but for some cause not known it was struck out by the Senate, so that the whole amount is now liable, according to the naked terms of the treaty as it now stands, to a per capita distribution. Unless some change in this particular be in some way authorized the just and honorable intentions of the Indians themselves will be defeated, and great injustice done to their creditors, which should by all means be avoided."

At the same session we again memorialized Congress; and on the 10th of August, 1850, Mr. Sebastian, from the Committee on Indian Affairs in the Senate, made a favorable report.—(See Senate Report No. 180, first session 31st Congress.)

This report recognized every principle on which we based our claim, viz:

1. That our contract was valid.
2. That the lien it gave us on the funds of the Western Cherokees was irrevocable.
3. That the services had been faithfully performed.
4. That the treaty of 1846 did not impair the lien.
5. That, in default of that fund, the debt survived against the United States.

The committee, however, being of opinion that the fund was still chargeable with our commissions, recommended, "that in the

proper appropriation bill a provision should be adopted, setting apart a certain amount of the sum due the Western Cherokees, in satisfaction of these claims."

5 At the same session of Congress, being upwards of seven years after the date of our contract, Congress appropriated five hundred and thirty-two thousand eight hundred and ninety-six dollars and ninety cents, with interest from the 12th day of June, 1838, until payment, in discharge of this claim. The interest was computed up the first day of October, 1851, producing three hundred and fifty-four thousand five hundred and eighty-three dollars and twenty-five cents, making the whole amount eight hundred and eighty-seven thousand four hundred and eighty-dollars and fifteen cents, ($887,480 15,) appropriated to discharge the claim of the Western Cherokees; but instead of complying with the recommendation of the committee of the Senate, Congress annexed a proviso to the appropriation to the following effect, viz:

"*Provided*, That no case shall any money hereby appropriated be paid to any agent of said Indians, or any other person or persons than the Indian or Indians to whom it is due."

Finally, the moneys were placed in the hands of the disbursing agent, and we took counsel and advised with him in relation to preventing, by injunction, the distribution of our portion of them among the individual Indians. The agent informed us that he would not obey such an injunction, if obtained, and we were advised that it was very doubtful whether we could avail ourselves of such a remedy. For the fourth time we laid our case before Congress, which was then in session. The following was a portion of our representation and prayer, viz:

"It is not the individual Indians, but the whole body, that is the debtor of your memorialists; and they could have little hope that the individuals, when thus virtually told by Congress that they were not bound, would bind themselves, when, instead of gaining anything by it, they would lose a portion of the glittering temptation placed within their reach. Nor could they shut their eyes to the facts that there would be many persons around the Indian agency who would dissuade the individual Indians from paying this debt, from interested or vindictive considerations.

"Your memorialists hoped that another resource was left to them in the judiciary of their country, by whose instrumentality they might be able to stop the funds in the hands of the disbursing agent of the government; but they are advised that the power of the judiciary to grant them redress is extremely questionable; and they have been assured by the agent who now has the funds in his hands that he will not regard any such judicial mandate.

"Under these circumstances, they again look to your honorable bodies for relief. It will be some months before these moneys can be paid out to the Indians—ample time to give effect to any act of legislation adopted at the present session.

"Your memorialists ask for nothing which they have not a right to claim and receive, according the principles of law and equity

which govern courts of justice in civilized and Christian nations; and they now pray for such legislation as will secure the payment of the debt out of the funds appropriated for the benefit of the Western Cherokees, or out of the treasury of the United States, but they will be perfectly content with a resolution or act enabling them to enjoy the payment of the moneys in the hands of the disbursing officer until their claims can be judicially investigated and decided."

But Congress were wholly deaf to our prayer.

Again we turned to the Executive, and in a letter dated March 14, 1851, "protested against the payment of the Western Cherokees of the one-twentieth part of those moneys, being the interest assigned to us for services prior to the ratification of the treaty."

We said: "The question we now wish to submit is, whether the United States, with everybody's eyes open as to the wrong, (not to use a harsher word,) are bound to proceed through the Indian office to the consummation of that wrong, by paying to the Cherokees, individually, moneys which were assigned away by competent authority, and for a valuable consideration, long before the treaty was formed?" We endeavored to satisfy the Secretary of the Interior, to whom this letter was addressed, that the payment of our moneys to the Cherokees would be the consummation of a palpable fraud upon us; that neither the treaty nor act of Congress ought to be construed so as to require or justify a fraud; and we concluded with the follow-lowing prayer, viz:

"We therefore respectfully ask at your hands an order to Colonel Drennen, who now has charge of the fund, to pay to us the one-twentieth part thereof, without further trouble, including interest thereon, as allowed by Congress. If, in consequence of steps already taken, or any other cause, the department hesitates to give such an order, then we most respectfully ask that the opinion of the Attorney General may be taken upon the points involved, not doubting that his talents and legal skill will enable him to point out some line of proceeding consistent at the same time with the rights of the citizens and the obligations of the government."

But no order was given, nor was the opinion of the Attorney General asked for.

The Secretary of the Interior and the Commissioner of Indian Affairs were perfectly satisfied of the justice of our claim; but considering themselves precluded from paying it by the proviso of Congress, they proposed to aid us in collecting it of the Western Cherokees, by sending out an agent for that purpose.

Your petitioner, Amos Kendall, addressed a letter to the Secretary of the Interior, dated July 1, 1851, containing the following passage, viz:

"The suggestion and request I have to make is, that Colonel Drennen be instructed not only to obey an injunction which may be obtained in our case and that of Colonel Stambaugh, but that, in case of difficulty with the Indians, he will give time to apply for and obtain one before making payment. I think that such instructions, coupled

with a strong expression of opinion from your department that these debts ought to be paid, would prevent all trouble."

No answer was received.

Having learned that a spirit of repudiation had sprung up in the Cherokee country, putting an end to all hope of a voluntary payment of our claims by the general assent of the Western Cherokees, your petitioner, Amos Kendall, addressed another letter to the Secretary of the Interior, dated August 17, 1851, concluding as follows, viz:

"I appeal to you, sir, to avert from our government and
7 country for the present, and enable Congress to avert forever, the stigma which cannot but attach to the consummation of such an outrage. On behalf of A. and J. E. Kendall and Colonel S. C. Stambaugh, whose aggregate claims amount to ten per cent. on the appropriations for the benefit of the western Cherokees or Old Settlers, I request and entreat an official order to Colonel Drennen, directing him to withhold that amount to await the further action of Congress. Surely the nature of the case, as now understood, will justify if it does not require this exercise of power on your part.

"And in view of the wrong now about to be consummated, unless prevented by your prompt interposition, it will not be deemed amiss in me most respectfully to repeat the protest heretofore made against being sent to the Cherokee country to collect moneys which by contract are payable at Washington, and again give notice that we, the counsel of the Western Cherokees, look to our government for the payment of our claims and all expenses, losses, and damages which have been or may be occasioned to us by its own wrong in this behalf."

To this letter no answer was received.

Although the Secretary of the Interior and Commissioner of Indian Affairs recognized the justice of our claim, they did not think themselves authorized, after the action of Congress, to do more than give us the benefit of their opinion and advise the Indians to make payment. To that end the Secretary of the Interior wrote the following letter to the Commissioner of Indian Affairs, viz:

"I have examined the instructions you propose to give Mr. Drennen in regard to the payments to be made to the Cherokees, and cordially approve them. You will please add to them that I have carefully examined the claims of Messrs. Thompson, Harris, and Kendalls against the Indians for professional services, and from the evidence before me I am satisfied they are just and reasonable, and should be paid. If I had possessed the legal authority I should have felt no hesitation in ordering their payment, but, as it is at least questionable whether I had the power to do so, I determined to refrain from such an interference. I regretted this the less, however, because I am persuaded the Indians will be disposed to fulfil their obligations in good faith when they are properly explained by Colonel Drennen."

The instructions alluded to recommended the raising a committee by the Indians to examine the claims against them, and the payment of such as they found to be just.

Protesting against the course pursued, and declaring that we still

held the United States responsible for our claims and for all losses and damages that might ensue from thus compelling us to seek justice from the individual Cherokees, who were not our debtors, your petitioner, John E. Kendall, visited the Cherokee country in the hope that the Indians, influenced by Colonel Drennen and the decided opinion of the government, would permit the payment of our claim; but all efforts to procure payment from the individual Cherokees were in vain, and your petitioner, John E. Kendall, after incurring much expense, and suffering much from sickness in an unaccustomed
8 climate, returned to Washington. And thus, after reiterated notices of our claim to both the executive and legislative departments of the government, and repeated recognitions of its justice, the moneys due to us were paid over to the Western Cherokees.

To obtain redress for the flagrant wrongs thus committed upon them, your petitioners, at the December session of 1851, petitioned Congress for payment of the amount due them out of the public treasury. The Committee on Indian Affairs of the Senate made a favorable report, accompanied by a bill for our relief, which fell among the unfinished business of that Congress.

At the December session of 1853, we again appealed to Congress for redress. The Committee on Indian Affairs of the Senate again recognized the justice of our claim, and the obligations of the United States to pay it after dissipating the fund upon which it was properly chargeable, and reported a bill requiring its payment out of the public treasury, which, like its predecessor, fell among the unfinished business of that Congress.

Again, at the present session of Congress, your petitioners applied for relief, and have by the Senate been referred to your honorable court. Your petitioners further state that they rely for the legality of their claim on the following authorities, viz:

In the case of Walsh *vs.* Whitcomb (2 Espinasse, pages 565–6) Lord Kenyon lays down the law in relation to powers of attorney as follows, viz:

"There is a difference in cases of powers of attorney. In general they are revocable from their nature; but there are these exceptions: Where a power of attorney is part of a security for money—there it is not revocable. Where a power of attorney was given to levy a fine as part of a security, it was held not to be revocable. The principle is applicable to every case where a power of attorney is necessary to effectuate any security; such is not revocable."

Our own Supreme Court have announced the same principle as established law in these United States. In the case of Hunt *vs.* Rousmanier (8 Wheaton, pages 201–2) Chief Justice Marshall lays down the law in the following words, viz:

"The general rule is, that a letter of attorney may at any time be revoked by the party who makes it, and is revoked by his death. But this rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract and is security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or, if not

so, is deemed irrevocable in law. Although a letter of attorney depends from its nature on the will of the person making it, and may in general be revoked at his will, yet, if he binds himself for a consideration in terms, or by the nature of his contract, the law will not permit him to change it."

The law as thus laid down had, prior to our contract with the Western Cherokees, been recognized and acted upon by the government of the United States.

At page 1,066 of "Attorney General's opinions," there is an opinion of Attorney General B. F. Butler, to the effect that a power of attorney to secure an agent's commission cannot be revoked. His language is as follows, viz:

9 "In my opinion, the letter of attorney to Mr. Lawrence, executed by N. Rogers, surviving executor of the estate, may at any time be revoked by him, except as to the admitted amount of Mr. Lawrence's commissions—five per cent. Your department, in my opinion, will therefore be justified in issuing the certificates on the award to Mr. Rogers himself, or to any attorney he may appoint, for ninety-five per cent. thereof, on his due revocation of the former power."

But the principle is much more explicitly laid down by Attorney General Gilpin, in March, 1840.—(Churchill's case, pages 1303–4.)

"Your first inquiry is, whether the provisions of the 9th and 17th articles, (which direct that the just debts of the Indians shall be paid out of any moneys due them for their improvements and claims, and that all claims arising under or provided for by the treaty shall be examined and adjudicated by certain commissioners, whose decisions shall be final,) apply to the case of a person to whom no debt was owing at the date of the treaty, but who has acted as an attorney for the Indian, for the recovery of his claim, and has had the sum in question adjudicated to him as a proper compensation for so acting. In reply to this inquiry, I have the honor to say, that I do not consider this to be one of the debts intended to be provided for by the 9th article of the treaty. I am of opinion, however, that if the person presenting the claim was a duly constituted attorney of the Indian, with authority to prosecute and recover the claim, and the department is satisfied that the contract between him and his principal is free from fraud, and is a just compensation for services rendered—in such case he has an interest in the fund which the department ought to recognize; and it should not, by paying over the whole amount to the Indian, subject him to probable danger of loss, and the certainty of much expense and delay.

"Your second inquiry is, whether the whole scope of the treaty does not warrant a payment to the Indians, in person, of such sums as may be due to them under it; or whether they must be paid to the persons who present powers of attorney from them.

"In reply to this inquiry, I have the honor to state, that the treaty clearly recognizes payments directly to the Indians, and the department will be fully warranted in so making them. I beg, however, to observe that I consider the remarks I have made in reply to your

first inquiry as equally applicable to these cases; for, certainly, where an attorney has performed an important service, collected the evidence, and been instrumental in securing a claim which might otherwise been lost; and where this has been done under the stipulation, or with a bona fide understanding that he was to receive the amount to which he was entitled directly from the United States, he has an interest in the fund, which the principle himself could not revoke, and which the department is bound to recognize."

It is also a settled practice at common law that an attorney has a lien upon the judgment of his client. Judge Spencer says, in Johnson's New York Reports, vol. 15, page 405: "It is fully settled by a long series of decisions, that courts of law will take notice of and protect the rights of assignees against all persons having either express or implied notice of the trust."

10 Your petitioners represent that their contract with the Western Cherokees was of the precise character described by the Supreme Court of the United States, where a letter of attorney forms a part of a contract, and is security for money, or for the performance of any act which is deemed valuable, and "is generally made irrevocable in terms, if not so, is deemed irrevocable in law." They also represent that their case is of the precise character of that stated by Attorney General Gilpin: "Where an attorney has performed an important service, collected the evidence, and been instrumental in securing a claim which might otherwise have been lost, and where this has been done under the stipulation, or with a bona fide understanding that he was to receive the amount directly from the United States, he has an interest in the fund which the principal himself could not revoke, and which the department is bound to recognize."

And your petitioners further represent that they entered upon the arduous task undertaken in their contract with the Western Cherokees upon the security of well settled law, and a declaration by the law officer of the government, in conformity with long practice, that the departments were bound to recognize this law in its application to contracts with Indians, constituting, as with your petitioners, the pledge of their government that in case of success they should not be deprived of their stipulated compensation.

In consideration of the premises, your petitioners pray that the sum of forty-four thousand three hundred and seventy-four dollars, being five per cent. on the amount appropriated by Congress to satisfy the claims of the Western Cherokees, may be awarded to them by your honorable court.

And inasmuch as the usual presumption that the government is always ready and willing to pay its debts is rebutted in this case by overwhelming testimony that it refused to pay this debt when demanded, your petitioners pray that interest on the said sum of forty-four thousand three hundred and seventy-four dollars may be awarded them from the date of the computation of interest on the appropriation made by Congress to satisfy the claim of the Western Cherokees until payment of the debt to your petitioners.

Your petitioners further represent, that by their contract with the

Western Cherokees they became entitled to one-twentieth part of any "sum or sums of money, or whatever else of value" might be allowed in full or in part satisfaction of their claim, the contract declaring that it was "the true intent and meaning of said" (Western Cherokee) "delegates that the said A. and J. E. Kendall shall receive five per cent. of any and everything of value which may be granted or appropriated on account of said claim, to be received directly from the United States without any further act or authority by or from the said Cherokees West."

Your petitioners further represent, that by the last clause of the second section of the treaty of 1835 with the Cherokees East, eight hundred thousand acres of lands adjoining the lands of the Western Cherokees beyond the Mississippi were granted by the United States to said Eastern Cherokees, in consideration of the payment of five hundred thousand dollars by deduction from the purchase money of the Cherokee country east; but the said Eastern Cherokees
11 had, up to the negotiation of the treaty of 1846, refused to accept said grant, and no title had been conveyed to them by the United States.

Your petitioners now show, that by the fourth article of the Cherokee treaty of 1846, the Western Cherokees were recognized as having had a just claim to one-fourth part of the consideration paid by the United States for the Cherokee country east, and a sum of money equal to one-third part of that accruing to the Cherokees East from the treaty of 1835, together with a joint interest in the eight hundred thousand acres of land ceded to them in that treaty, was allowed the Western Cherokees in full satisfaction of their claim.

Your petitioners further show that one-fourth part of these lands, being the relative interest therein secured to the Western Cherokees, is two hundred thousand acres, the value of which, according to the criterion fixed by the treaty of 1835 aforesaid, is one hundred and twenty-five thousand dollars, being one-fourth of five hundred thousand dollars paid by the Eastern Cherokees for the whole tract; and your petitioners claim that by their contract they became justly entitled to ten thousand acres of this land, or to five per cent. on the value of two hundred thousand acres.

Yet your petitioners show that notwithstanding the lien which their contract gave them to one-twentieth part of everything of value which might be recovered in part or in full satisfaction of the claim of the Western Cherokees, the United States, with the concurrence of the Western Cherokee delegation, by the first article of the treaty of 1846, vested the interest conceded to the Western Cherokees in the eight hundred thousand acres of land aforesaid in the whole Cherokee Nation, promising a patent therefor; and in the second article of the treaty of 1846, the United States, with like concurrence of the Western Cherokee delegation, proceeded to dissolve and annihilate the Western Cherokees as a separate nation, tribe, or party, and merge them in the Cherokee Nation; all which was in violation of the rights of your petitioners, as secured by contract.

As the interests in the lands aforesaid secured to your petitioners

by their contract has been put forever beyond their reach by the unauthorized concurrent acts of the Western Cherokee delegation and the United States, and the Western Cherokees as a separate party have by a similar act been dissolved, your petitioners maintain that their right to redress survives against the surviving wrongdoer, the government of the United States. And as the United States, by their own act, place the lands to which they were entitled beyond their reach, your petitioners claim a sum of money in lieu thereof, equal to five per cent. upon their value as fixed by the treaty of 1835, being six thousand two hundred and fifty dollars, and interest thereon from the 17th August, 1846, the date of the ratification of the treaty by which the wrong was consummated.

Your petitioners annex hereto a certified copy of their contract with the Western Cherokees, marked A, and also copies of the three reports of the committee of the Senate heretofore alluded to, marked B, C, and D; all which documents they pray may be made parts of this petition.

JOHN E, KENDALL.
AMOS KENDALL.

12 COUNTY OF WASHINGTON,
District of Columbia, ss:

On this 19th day of February, 1858, personally appeared before me, a justice of the peace in and for the county and district aforesaid, John E. Kendall, who makes oath on the Holy Evangely of Almighty God that the statements of facts made in the foregoing petition are just and true, to the best of his knowledge and belief.

Sworn before

F. J. MURPHEY, *J. P.* [SEAL.]

13 A.

Whereas the Cherokee Indians, who emigrated to the country west of the Mississippi, under the protection and guarantees of treaties between the United States and the Cherokee Nation west of the Mississippi, in 1828 and 1833, have claims upon the United States for wrongs done them in violation of said guarantees, under color of a treaty with the Cherokees East, concluded in December, 1835; and whereas said wrongs have not only deprived them of the lands which were granted and guaranteed to them forever, but have put an end to their existence as a separate people, and exposed them to annoyance, oppression, and personal danger, in utter defeat of the main object in view when they consented to abandon the home of their fathers; and whereas they are desirous of making their rights and condition clearly known to the government and people of the United States, in the confidence of receiving at their hands remuneration for the property of which they have been despoiled, and obtaining new guarantees to protect them in their property and persons; and whereas the very wrongs of which they complain have embarrassed every movement through recognized authorities to obtain redress, and de-

prive them of the means necessary to command it; and whereas at a council held by a number of the chiefs, headmen, and counsellors of the Western Cherokees, or Old Settlers under the treaty of 1817, convened at the house of Mrs. Nancy Rogers, in the forks of the Verdigris and Grand rivers, on the 9th day of April, 1842, the following proceedings, among others, were had, viz:

"*Resolved*, That a delegation be appointed to proceed to the city of Washington as soon as practicable, to confer with the President of the United States on the affairs of the Western Cherokee nation; and that this delegation be, and they are hereby, vested with full power and authority to act for and in behalf of the said nation, to effect an arrangement and final adjustment of their affairs with the United States government; that they have also full power to employ and pay counsel to aid and assist them in accomplishing the purposes of their appointment; and in all things these, the delegates representing the Western Cherokees, are empowered to act definitely and conclusively for the nation, the same as if all their people were personally present."

Whereupon the following delegates were unanimously chosen in pursuance of the above resolution, viz: John Rogers, James Cary, sr., (or Chicken Cock,) and Thomas Wilson; and that Peter Harper be appointed clerk to the delegation.

And whereas at another counsel or convention of chiefs, headmen, and counsellors of said Cherokees west, held at the house of Mr. Alexander Foreman, mouth of Illinois river, Illinois district, on the 7th day of November, 1842, the following resolutions were adopted, viz:

"*Resolved*, That we agree with and adopt the resolutions and acts entered into by Captain John Rogers and others, on the 16th day of April, 1842.

"*Further resolved*, That John L. McCoy and Ellis F. Phillips be and are appointed as a delegation, to be attached to the num-
14 ber already appointed to proceed to the city of Washington, to faithfully execute and carry out all claims unadjusted on the part of the Western Cherokees with the government of the United States."

And whereas Messrs. Amos and John E. Kendall, acting as agents for claims in the city of Washington, having confidence in the justice of said claims, and in the disposition of the government and people of the United States to make reparation to this much injured people, are willing to undertake the management of their case for a compensation altogether contingent:

Now, therefore, this article of agreement, entered into this 12th day of July, 1843, between Captain John Rogers, John L. McCoy, and Ellis F. Phillips, a majority of said delegates, for and on behalf of the said Cherokee nation west, of the one part, and Amos Kendall and John E. Kendall, of the District of Columbia, of the other part, witnesseth: That the said Amos Kendall and John E. Kendall do stipulate and agree, either separately or in conjunction with such other person or persons as have been or may be employed by said

Cherokees West, to act as counsel in the prosecution of such claims to final adjustment before the executive departments and the Congress of the United States, viz: to prepare and submit to the Secretary of War a full statement in writing of the nature and extent of said claims, and use all proper means to obtain from him a favorable report thereon at the next session of Congress; to prepare for publication a full statement of the wrongs and claims of the Cherokees West, and, when printed, put it into the hands of the members of the next Congress, and such other persons as they, the said A. and J. E. Kendall, may think proper; to prepare any memorial or memorials to Congress, setting forth said claims; to digest and draw up any statement or statements of facts or argument necessary for the information of that body, or either house, or any committee or committees thereof, or any commission to which the same may be referred, and in all respects to use due diligence and all proper means to obtain the favorable action of said committees and of Congress itself, and of any commission, not leaving Washington, and the same to renew and pursue until said claims shall be adjusted, or so long as there shall be any reasonable ground to hope for such adjustment.

In consideration whereof, the undersigned, John Rogers, John L. McCoy, and Ellis F. Phillips, delegates duly authorized as aforesaid, do hereby, on behalf of said Cherokees West, covenant and agree to pay, or cause to be paid, the full commission of five per cent. to the said A. and J. E. Kendall, upon any sum or sums of money or whatever else of value may be allowed and appropriated in full or in part satisfaction of said claims, to be paid from time to time as appropriated or allowed; and the said delegates do hereby authorize and empower the said A. and J. E. Kendall, as agents and attorneys in fact for the said Cherokees West, to demand and receive from the treasury of the United States, or from the proper office or officer thereof, one-twentieth part of all sums of money which may be allowed and appropriated, or one-twentieth part of any stock, scrip, or any other species of funds, securities, or annuities which may be allowed, to be made out and issued in their own names; and if lands or other property, or any interest therein, shall be granted in discharge of said claims, or any part thereof, to demand and re-
15 ceive from the proper office or officer a full title to one-twentieth part thereof, it being the true intent and meaning of said delegates that the said A. and J. E. Kendall shall receive five per cent. or one-twentieth part of any and everything of value which may be granted or appropriated on account of said claims to be received directly from the United States, without any further act or authority by or from the said Cherokees West.

And the said delegates do further authorize and empower the said A. and J. E. Kendall, as agents and attorneys in fact of the said Cherokees West, to sign the names of the said delegates to any letters and memorials to the President, Secretary of War, Senate, House of Representatives, or other officer or individual, necessary to the prosecution and allowance of said claims: and to execute any receipt, receipts, acquittances, or other instruments of writing which may be

necessary to procure the payment or delivery to them according to the true intent and meaning of this instrument, of one-twentieth part of the money, property, or evidence of right, title, or claim to money or property which may be appropriated or allowed in satisfaction of said claims, in full or in part; and it is further covenanted and agreed by said delegates, on behalf of said Cherokees West, that they, the said Cherokees, shall execute any additional power or authority, if any may be deemed necessary by the government of the United States, to enable the said A. and J. E. Kendall to receive and enjoy the commission aforesaid according to the true intent and meaning of this instrument.

Witness our hands and seals, at Washington, D. C., the day and date above written.

JOHN ROGERS.
E. F. PHILLIPS.
JOHN LOWRY McCOY.
AMOS KENDALL.
JOHN E. KENDALL.

Signed, sealed, and delivered in the presence of—
J. E. Dow, *J. P.*

DISTRICT OF COLUMBIA,
County of Washington, ss:

On this twentieth day of July, A. D. 1843, before the subscriber, a justice of the peace in and for said county, personally appeared John Rogers, E. F. Phillips, John L. McCoy, Amos Kendall, and John E. Kendall, subscribers and parties to the above instrument of writing, and declared the same to be their free acts and deeds, the interlineations on the third page having been made before signing.

[SEAL.] J. E. DOW, *J. P.*

Indorsement.

AUGUST 14, 1846.

The undersigned delegates of the Western Cherokees, or Old Settlers, being a party to the treaty recently concluded to put an end to Cherokee difficulties, do hereby authorize and request the Sec-
16 retary of War to pay the commissions stipulated for in the within contract, out of any moneys which may be appropriated to pay the debts of the Old Settlers, or out of any moneys which may be found due to them under the said treaty, it being our intention that this contract shall be executed in good faith.

JOHN BROWN.
E. F. PHILLIPS.
his
WM + DUTCH.
mark.
his
RICHARD + DREW.
mark.
JOHN L. McCOY.

Witness: NELSON ROGERS.

The above is a correct copy of the document it purports to be published in Senate Document, Ex. Doc. No. 28, 30th Congress, 2d session.

L. LEA,
Commissioner of Indian Affairs.

December 6, 1850.

17 B.

In the Senate of the United States, August 10, 1850, *Mr. Sebastian made the following report:*

The Committee on Indian Affairs, to whom was referred the memorial of Amos and John E. Kendall and S. C. Stambaugh, asking payment of their claims against the Western Cherokees, have had the same under consideration, and respectfully report:

That on the 6th day of August, 1846, a treaty was made between the United States, by commissioners appointed on their part, and the Cherokees, consisting of three distinct recognized parties or factions, each of whom had a separate and distinct interest, and were represented by distinct delegations, who executed the treaty as parties, and prosecuted their claims through different counsel. These divisions had existed for many years, and originated in the treaty of 1835 made with the Eastern Cherokees. These parties to the treaty of 1846 were the "government party," or "Eastern Cherokees," the "treaty party," and "Western Cherokees," or "Old Settlers," being those who had emigrated to the west under the treaties of 1817 and 1819, and were the undisputed occupants of the country when the treaty of 1835 provided for the final emigration of the remaining or Eastern Cherokees to the west. To prosecute their claim and procure redress for their wrongs the Western Cherokees employed S. C. Stambaugh and Messrs. Amos and John E. Kendall as their agents or attorneys, investing them with full power and authority in the premises, and stipulating to pay them a certain commission upon all amounts which they might recover or get allowed by the United States. These contracts were entered into in writing by the delegates duly chosen by the national council and specially authorized to employ counsel. Their contracts with these persons appear to have received the subsequent assent of several national councils, and again ratified by the delegates who made the treaty, and the payment of their compensation directed out of any moneys which might be due them. These contracts, copies of which are annexed, appear to have been fairly made, not unreasonable in their terms, since they were entirely contingent in their character. When these engagements were made the chances were that nothing would ever be recovered. The prosecution of these claims, it was evident, would be a work requiring much time, labor, and expense. The Commissioner of Indian Affairs, in his special report to Congress, February 8, 1849, fully attests the ability and fidelity with which they discharged their duty. For the full details of the facts connected with this subject the committee refer to that report.

Inasmuch as these contracts appear to have been made for a necessary purpose, for a good consideration not forbidden by law, and in terms which have been faithfully performed by the memorialists, the committee are of opinion that they should be discharged according to their tenor, if any redress be left in the power of Congress to afford. Upon this question the following observations are submitted:

18 When these engagements were entered into the Western Cherokees were a distinct party, forming, in fact, a separate political body, and directing their separate interests through the action of a "national council." As such they were recognized, through their delegations and their agents, from 1842 until and at the making of the treaty of 1846, in which the United States regarded them as having distinct interests, and competent to release their separate claim to the country east, and agree to an indemnity for it. This same authority had created this debt against the "Western Cherokees," and secured it by an equitable lien on the funds to be paid them under that treaty, of which the United States were fully cognizant. At this time it was a debt against the "Western Cherokees," for which any national fund of theirs would be liable generally, but that under the treaty specifically. By that treaty provision was made for setting apart the sum of $50,000 to discharge their national debts; but this provision was stricken out by the Senate, the effect of which was to appropriate the whole of their money due under that treaty to a per capita distribution. Thus the treaty fund was gone. The clause of the treaty which merged all the different parties in one common nation and under one government destroyed their separate political existence, "except for the purpose of executing the treaty." Thus every national fund was gone, and the nation extinguished. Against whom did the debt survive? Not against the individual Cherokees, for they were not parties to it. Not against the nation, for that was extinct. Not against the whole nation of Cherokees, for the union was political, and had no reference to the separate debts of its factions; but the debt survived, and against the fund pledged for its payment, or, in default of that, against the United States. The Cherokees could not by the treaty release their obligation, nor could the United States, neither debtor nor creditor, release it. But they could by the treaty enter into an obligation inconsistent with its payment, and thus become responsible for it themselves. Other means of payment being exhausted, either the United States are liable if the treaty has released the fund, or the fund is liable if the treaty has not destroyed the lien. That there was a specification and appropriation of so much of that fund as was necessary to pay the debt cannot, we think, be questioned. It was created by an authority competent to do it. The pledge was irrevocable. It was not a mere agency to receive, but an equitable transfer of so much of the fund. It was a security for payment, and if the United States has discharged it, they are liable for the debt. But the committee are of the opinion that the treaty does not necessarily exempt the fund provided under it from the satisfaction of those just claims charged upon it by competent authority prior to the treaty.

It may be regarded as a stipulation to pay in a particular form the balance justly due the Cherokees. This balance is the residuum after paying those claims which, by the application of the principle of law to such a case, are a lien on the fund.

So far as respects these debts the United States is not only the debtor, but the trustee. The whole fund is a trust, for the proper disbursement of which this government is bound, according to the terms fixing its disposition. The first of these is the contract with the memorialists, directing the payment of a certain amount to them by the United States; the other, the 5th article of the treaty
19 of 1846, directing a per capita distribution. Both compacts were made by the same authority, and both equally binding as a disposition of the fund to which they refer, and both can be executed as a trust, which the United States can discharge by administering one, subject to the prior obligation to perform the other.

The committee are aware that the opinion has been entertained that these debts were destroyed by the treaty of 1846, and that the distributive shares of the treaty fund have become private property beyond the control either of the Cherokees or of Congress, and that a payment of these claims would be a misapplication of the treaty fund, for which the United States would be responsible. If this be so, they are also liable for the destruction of the debt by treaty. As the United States, it would seem, are liable at all events, it is surely better to provide for the payment out of the fund originally and properly charged with it, and thus prevent payment out of the treasury. In such case, the claim of the Indians for reimbursement would scarcely be urged effectually. This would do effectual justice to all parties, and settle this prolonged and intricate controversy with the Cherokees while the whole subject is yet in our hands. The committee believe that to set apart a portion of this treaty fund, to enable the Indians to discharge their national debts contracted and charged by competent authority upon the fund before it became the subject of individual property, would not only be just, but a true discharge of the trust which the United States have assumed.

The committee therefore recommend that in the proper appropriation bill a provision should be adopted, setting apart a certain amount of the sum due the Western Cherokees, for satisfaction of these claims.

C.

In the Senate of the United States, April 20, 1852, *Mr. Cooper made the following report:*

[To accompany bill S. No. 379.]

The Committee on Indian Affairs, to whom was referred the memorial of Messrs. Amos and John E. Kendall, claiming to be reimbursed for moneys belonging to them, wrongfully paid out by the government of the United States to the "Western Cherokees," or "Old Settler Indians," have had the same under consideration, and respectfully report:

That it appears the memorialists were employed by written con-
r act entered into with the duly authorized delegates of the "West-

ern Cherokees," under date of July 12, 1843, as expressed in the preamble, "to aid them in making their rights and conditions clearly known to the government and people of the United States, in the confidence of receiving at their hands remuneration for the property of which they have been despoiled, and obtaining new guarantees to protect them in their property and persons." Connected with this contract, as security for the payment of an entirely contingent compensation, was coupled a power of attorney, authorizing the memorialists "to demand and receive from the treasury of the United States, or from the proper office or officers thereof, five per cent., or one-
20 twentieth part, of any and everything of value which may be granted or appropriated on account of said claim, to be received directly from the United States, without any further act or authority by or from the said Cherokees West."

"By law such a power is irrevocable, as will appear not only by decisions of British courts, but likewise by those of the Supreme Court of the United States." (See 2 Espinasse, Nisi Prius, p. 565, and authorities referred to; also Hunt *vs.* Rousmanier, 8 Wheaton, 201–216.) The same doctrine was recognized by Attorney General Gilpin, in his opinion of April 20, 1837.

That the services were faithfully performed by the memorialists appears, first, by the indorsement on the contract made by the duly authorized delegates, the same who had before signed the treaty of 1846 after the ratification of that treaty, authorizing and requesting "the Secretary of War to pay the commissions stipulated in the within contract out of any moneys which may be found due to them under the said treaty; it being our intention that this contract shall be executed in good faith." Secondly, by the report of Hon. William Medill, Commissioner of Indian Affairs, dated February 8, 1849, (Senate Ex. Doc. No. 32, 1st session 32d Congress, page 25,) in which he says: "The files of this department attest the assiduity and ability with which Messrs. Kendall and Stambaugh attended to the duty entrusted to them, and I think it highly probable that the 'Western Cherokees,' or 'Old Settlers,' are greatly indebted for the stipulations made for their benefit in the treaty of 1846, to the researches and persevering efforts of their counsel. The evidence upon which I have based my opinion is my own knowledge of the personal exertions of the counsel named," &c. And by the reference made to these claims by Hon. Orlando Brown, successor of Mr. Medill, in his annual report, dated Nov. 30, 1849, in which he says: "A considerable amount will be due to that portion of the Cherokees known as the Old (or original) Settlers west of the Mississippi, who, as a separate and distinct community, have incurred liabilities of various kinds, and among others, for valuable and efficient services rendered them in prosecuting their claims against the government, and which, it is well known, were greatly instrumental in effecting the negotiation of those claims, and the large allowances in consideration of them."

Thirdly, by the letter of the Secretary of the Interior, of the 18th July, 1851, (page 79, Senate Ex. Doc. No. 32, 1st session 32d Con-

gress,) in which he says: "I have carefully examined the claims of Messrs. Thompson, Harris, and Kendalls against the Indians for professional services, and from the evidence before me I am satisfied that they are just and reasonable, and should be paid."

It thus appearing that there was a regular power of attorney, made by the proper and authorized representatives of the "Western Cherokees" to the Messrs. Kendalls, containing an assignment of five per centum of the fund which might be recovered for the use of the said Cherokees, the committee are of opinion that equity and good faith unite in requiring the payment of such sum as may be found due to the claimants by the proper accounting officers of the government. They have therefore reported a bill requiring the First Comptroller to examine the claim of the memorialists, and if he shall find
21 that a power of attorney was executed, and an assignment made by the authorized representatives of the Western Cherokees to the claimants, and that, by act of the United States, such portion of the fund as was due to them under the assignment was paid over to the Indians against their consent, and after notice by the claimants to the contrary, in such case he shall report the amount due to them, which is directed to be paid out of any money in the treasury not otherwise appropriated.

D.

In the Senate of the United States, March 14, 1854, *Mr. Brown made the following report:*

[To accompany bill S. 280.]

The Committee on Indian Affairs, to whom was referred the memorial of Messrs. Amos and John E. Kendall, claiming to be reimbursed for moneys belonging to them, wrongfully paid out by the United States to the Western Cherokees, or Old Settler Indians, have had the same under consideration, and report:

That the Western Cherokees, a branch of the Cherokee tribe of Indians, had a country west of the Mississippi river, to which they emigrated about the year 1820. Here they established a government of their own, with a written constitution and laws, and an independent chief. The United States treated with them, in all respects, as a separate nation.

In 1835 the United States treated with the Eastern Cherokees, and some time after removed them to the west and settled them on the territory then occupied by the Western Cherokees. Feuds sprung up which soon led to violence and bloodshed. The authority of the Western Cherokees was overthrown, their laws put at defiance, and their chief expelled. These transactions, in the judgment of the Western Cherokees, gave them, as a separate tribe, a just claim on the United States for indemnity. But this claim was not respected by the executive department of the government.

In 1843 the Western Cherokees sent a delegation to Washington, fully empowered to present and urge their claim, to employ counsel,

and generally to do whatever was necessary to the successful prosecution of the case. This delegation engaged the services of Amos Kendall and John E. Kendall as attorneys, and entered into a written agreement with them, whereby the Kendalls obliged themselves to prosecute the claim, and the Indians agreed to pay them five per cent. of whatever should be obtained. The contract authorized and empowered the Kendalls to draw from the United States, in their own name, this five per cent.

The evidence is abundant that the Messrs. Kendalls prosecuted the claim with industry, skill, and ability to a final issue, whereby the Indians recovered from the United States a sum exceeding eight hundred and eighty thousand dollars. The sum to be paid was settled by treaty stipulations entered into between the United States and the Western Cherokees. The United States paid the whole sum
22 to the Indians, in disregard of Kendalls' claim for five per cent. And the disbursing officer of the government, in pursuance of an act of Congress to that effect, paid the money to the Indians per capita.

The Kendalls make the following allegations:

1st. That they had a subsisting valid contract with the Indians, whereby they were to have five per cent. of the amount recovered, with the right to draw on the United States, in their own name, for that sum; that for this purpose they have a power of attorney, properly executed, of which the United States had notice; and that said power of attorney was irrevocable, and was, in fact, an assignment to them of the five per cent.

2d. That, notwithstanding these facts, the United States entered into a treaty with the Indians, and agreed to pay them the whole sum of eight hundred and eighty thousand dollars and upwards, and even rejected a proposition of the Indians to set apart a small sum to pay their debts.

And then, as if to prevent the headmen and chiefs from complying with their contract to pay their attorneys, the United States, without solicitation from the Indians, paid the money per capita; and, finally, that the United States, by their treaty with the Western Cherokees, obliterated them as a tribe, and merged them in the Cherokee Nation. By all of which acts, the claimants allege, they have been defeated in obtaining their just dues from the Indians, and that the United States has rendered itself liable to them for payment.

There has been no laches on the part of the Kendalls whereby their rights have been lost, nor can it be pretended that they have not kept the government constantly advised of the existence and nature of their claim.

The claim rests mainly, we think, on these points:

1st. Was the contract valid, as between the Indians and Kendalls?

2d. Was Kendalls' power of attorney irrevocable, and was it, in fact, an assignment to them of five per cent.?

3d. Has the conduct of the United States been such as to defeat the Kendalls in collecting a just debt from the Indians, and to render it impossible for them ever to collect it?

On the first point: We find that within the last few years, and long after Kendalls made their contract with the Western Cherokees, the government had been in the habit of respecting contracts like these. Custom, which had become the common law of the case, sanctioned the contract at the time it was made. And though the government may now treat the Indians as infants, incapable of contracting, yet we submit that a contract, even with an infant, would be binding, if it was sanctioned by the custom and common law at the time at which it was made. The contract before us was sanctioned by the every-day practice of the government at and anterior to its execution. It was in nowise repugnant to any existing custom or law regulating intercouse with the Indians, and we think it was valid as between the Indians and Kendalls.

We may here add that the compensation (five per cent.) was not exorbitant, considering the nature of the claim, and the time, labor, and money expended by the Kendalls in bringing it to a favorable issue.

On the second point: We think the power of attorney was irrevocable. It authorized the Kendalls "to receive directly from the
23 United States, without any further act or authority by or from the Indians," their fee of five per cent. That such a power of attorney cannot be revoked, the authorities are full and clear.—(See Espinasse, p. 565–6: Wheaton, 8th vol., p. 201–2, and the cases referred to; Attorney General's Opinions, p. 1066, B. F. Butler; p. 1303–4, Attorney General Gilpin.) We think the assignment of the five per cent. is fairly deducible from the language of the instrument which authorizes the Kendalls "to demand and receive from the United States, or from the proper officer or officers thereof, five per cent." * * "and to execute any receipts, acquittances, or other instruments in writing" therefor.

The power of attorney being irrevocable, the Indians had no right to demand the money; and the United States being fully notified of the assignment of the five per cent. to the Kendalls, ought not to have paid it over to the Indians.

On the third point: It is clearly shown that when the Indians treated with the United States they desired to pay their debts, and inserted an item of fifty thousand dollars in the treaty for that purpose, but the Senate struck it out before the treaty was ratified. The Indian delegates who made the treaty requested the Secretary of War to pay the Kendalls; but Congress had directed the money to be paid to the Indians per capita, and it was accordingly so paid. The United States, by these acts, prevented the Kendalls from collecting their debt from the Indians. And by their further act of obliterating them as a separate tribe, and merging them in the Cherokee Nation, they rendered it impossible for the Kendalls to prosecute a claim against them.

Finding that the claimants had a valid contract with the Western Cherokees, and that they had, with fidelity and skill, executed their part of the contract; that they had an assignment of money in the hands of the United States to pay their claim, and a power of attor-

ney to draw for it, and to execute a receipt; that the United States had full notice thereof; and further, that it not only did not pay the money as it ought, but that it prevented the Indians from doing so; and has, by its own acts, rendered it impossible for the claimants to prosecute their claim against the Indians, your committee conclude that the United States, in equity and justice, is liable for the debt, and therefore they report a bill.

24 In the Court of Claims.

Amendment.

AMOS and J. E. KENDALL
vs.
THE UNITED STATES.

"That said claimants are citizens of the United States; that they have at all times borne true allegiance to the government of the United States; and that they have not in any way voluntarily aided abetted, or given encouragement to the rebellion against said government."

DISTRICT OF COLUMBIA, *County of Washington, ss:*

Ransom H. Gillet, of counsel for the above-named claimants, being duly sworn, saith that he has read the petition in the above-entitled cause, as proposed to be amended, and verily believes the same to be true.

R. H. GILLET.

Subscribed and sworn before me this eighteenth day of January, 1864.

JAMES C. WELLING,
Assistant Clerk of Court of Claims.

25 In the Court of Claims.

AMOS & J. E. KENDALL
vs.
THE UNITED STATES

And now, to wit, 29th of January, 1866, the court, upon due consideration of the premises, do order, adjudge, and decree that the said claimants take nothing by their suit, and that the said petition be dismissed.

By the court.

26 In the United States Court of Claims.

AMOS KENDALL AND JOHN E. KENDALL
vs.
THE UNITED STATES.

To the Court of Claims:

Your petitioners in the above-entitled cause pray the allowance

of an appeal to the Supreme Court of the United States from the judgment of this court rendered in this cause.

And they pray the court to certify to the said Supreme Court the following facts found and points decided by this court in said cause, to wit:

That on the 12th day of July, 1843, a certain Indian tribe known as the Western Cherokees, Old Settlers, or Cherokee Nation West, claimed against the United States a large sum of money, and on that day, by their delegates representing them in the premises, executed and delivered the written agreement and power of attorney exhibited with the petition and made a part thereof and marked A, and that claimants on their part also executed and delivered the same.

27 That these claimants acted under said agreement and power of attorney in the management of the affairs of said Western Cherokees, with the officers of the several departments of the government, and were therein recognized by said officers as the attorneys and agents of said Western Cherokees, and that, as such, the said claimants assiduously and laboriously performed their duties.

That on the 14th of August, 1846, the said Western Cherokees, by their delegates representing them in the premises, executed and delivered to these claimants the order bearing date on that day, and indorsed on said agreement, marked A, and exhibited therewith. And said agreement and order were communicated and known to the officers of the Bureau of Indian Affairs, and reported to Congress by the Secretary of War, before the 30th of Sebtember, 1850, to wit, on the 9th day of February, 1849.

That the claims of the said Western Cherokees referred to in said agreement were finally adjusted by and under the provisions of the treaty with said Cherokees of August 6, 1846. That subsequently, on the thirtieth of September, 1850, Congress made an appro-

28 priation amounting to $887,480 15 in satisfaction of said claims, with this provision: "*Provided*, That in no case shall any money hereby appropriated be paid to any agent of said Indians or any other person or persons than the Indian or Indians to whom it is due."

That after the said appropriation was made, and before any part thereof was paid out, the claimants applied to the Secretary of the Interior, who was the proper officer to act in that behalf, to have one-twentieth part thereof paid to them under said agreement and power of attorney, but without success.

That the money so appropriated was paid to the said Cherokee Indians *per capita* except an amount of $67,940 that was retained by the department to pay claims against them.

29 And thereupon the Court of Claims ruled that the claimants were not entitled to any relief, and that their petition should be dismissed.

And the claimants now assign for error in the said rulings: that upon the facts so found by the court they are entitled to recover from the United States five per cent. or one-twentieth part of the moneys appropriated in satisfaction of the said claims of the said Western

Cherokee Indians, by virtue of said written agreement, dated on the 12th of July, 1843, and the order indorsed thereon and dated the 14th of August, 1846.

CARLISLE & McPHERSON,
For Claimants.

30 In the Court of Claims.

AMOS AND J. E. KENDALL
vs.
THE UNITED STATES.

I, Sam'l H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing is a true transcript of the pleadings in the above-entitled case, and of the final judgment of the court thereon, and of the petition of the claimant for the allowance of an appeal, as certified by the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 30th day of June, A. D. 1866.

[SEAL.] SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

Attest: JOSEPH CASEY,
Ch. J. Ct. of Cl.

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